IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.01.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A) No.2689 of 2006

Commissioner of Income Tax
Chennai. .. Appellant

Vs.

M/s.NEPC Textiles Ltd.,
No.36, Wallajah Road,
Chennai-2. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 12.5.2006 made in ITA No.1673/Mds/2002 for the assessment year 1996-97 (ITA.No.231/2001-02 dated 09.07.2002 on the file of the Commissioner of Income-Tax (Appeals) Central - 1, Chennai against P.A.No.AAACN 157 of dated 24.08.2000 on the file of the Deputy Commissioner of Income-Tax, Central Circle I(1), Chennai)

For Appellant : Mrs.Pushya Sitaraman
Senior Standing Counsel for IT Department

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal dated 12.5.2006 made in ITA No.1673/Mds/2002 for the assessment year 1996-97.

2. The Revenue is the appellant. The issue raised in this appeal relates to the assessment year 1996-97. The assessee company filed its return of income disclosing a loss of Rs.3.59 crores. On completion of assessment, the assessing officer reduced the loss to Rs.87.93 lakhs and treated the reduction of loss being difference arising on account of undisclosed income. The assessing officer also passed an order under Section 271(1)(c) of the Act levying penalty of Rs.89.64 for concealment of income. Aggrieved by the order imposing penalty, the assessee filed an

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appeal before the Commissioner of Income-tax (Appeals), who cancelled the penalty and allowed the assessee's appeal. On appeal at the instance of the Revenue, the Income-tax Appellate Tribunal dismissed the appeal by holding that penalty cannot be levied under Section 271(1)(c) where the assessed income was loss. Hence, this appeal by the Revenue raising the following questions of law:-

> " Whether in the facts and circumstances of the case, the Tribunal was right in cancelling the penalty under Sec.271(1)(c) of the Income Tax Act, 1961 on the ground that the total assessed income of the assessee was only a loss ? "

3. Mrs.Pushya Sitaraman, learned Senior Standing Counsel appearing for the appellant fairly concedes that the issues raised in this appeal is already decided by this Court in COMMISSIONER OF INCOME-TAX v. A.HARIHARAN, [2006] 282 ITR 607.

4. It is trite law that the loss cannot be taken into account in computing penalty. Similarly, the amount representing unexplained credit cannot be treated as concealed income for levying penalty, vide COMMISSIONER OF INCOME-TAX v. C.R.NIRANJAN [(1991) 187 I.T.R. 280].

5. This Court, in COMMISSIONER OF INCOME-TAX v. A.HARIHARAN, [2006] 282 ITR 607, cited supra, following the decision of the Apex Court in COMMISSIONER OF INCOME-TAX v. PRITHIPAL SINGH AND CO. [(2001) 249 I.T.R. 670], whereunder the Apex Court affirmed the view of the Punjab and Haryana High Court in the same case reported in (1990) 183 I.T.R. 69, while considering the scope of the words "income" and "in addition to tax, if any, payable by him", employed in Section 271(1)(c) of the Act, observed as hereunder:

> " The word "income" occurring in clauses (c) and (iii) of Section 271(1) of the Income-tax Act, 1961, refers to positive income only and not a loss. Penalty could be imposed only in addition to the tax payable. A plain reading of clauses (ii) and (iii) in section 271(1)(c) of the Act, particularly in the context of the words "in addition to tax, if any payable to him" employed in sub-clauses (ii) and (iii) would make it clear that the penalty contemplated in all the above clauses is a measure of tax payable by the assessee. In other words, if no tax is payable by the assessee, there would be no penalty which could be levied on the assessee. The penal provisions of section 271 (1)(c) are attracted only in the case of an assessee having positive income and not loss as the question of concealment of income to avoid payment of tax would arise only in the former case."

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6. That apart, this Court in RAMNATH GOENKA v. COMMISSIONER OF INCOME-TAX [(2003) 259 I.T.R. 229], following the decisions cited above, held that penalty is imposable only in cases where tax has been levied and that no penalty can be levied when the result of the computation made by the Assessing Officer is a loss. In other words, penalty is not leviable when the assessment did not show any taxable income, but net loss.

In view of the settled proposition, finding no substantial question of law that arises for our consideration in this appeal, the same is dismissed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sra

To:

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras Bench "B"
Rajaji Bhavan, III Floor,
Besant Nagar, Chennai - 90.
2.The Commissioner of Income
Tax (Appeals), Central-1, Chennai.
3.The Commissioner of Income-Tax, Chennai.
4.The Deputy Commissioner of
Income Tax, Central Circle-I(1),
Chennai.

1 cc To Mr.Pushya Sitaraman, Standing Counsel for I.T.Cases, SR.735.

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